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No. 90-1935

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORMAN WILLIAMS and SUSAN LEVINE,
Petitioners,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Summary

Petitioners contend that the State of Vermont administers its motor vehicle purchase and use tax in a way that discriminates against new residents. They contend that old residents, but not new residents, who acquire and register a car outside Vermont qualify for a tax credit equal to the out-of-state sales tax. The State disputes this contention. The tax credit is available to both the new and the old resident who merely acquires a car outside Vermont, but is not available to any resident who also registers the car out-of-state. *See e.g.*, App. 25a-28a (deposition excerpts of Clinton Krauss).

In 1985 this Court held that the tax credit statute was discriminatory on its face and remanded the case for proceedings consistent with its opinion. *Williams v. Vermont*, 472 U.S. 14 (1985). The Court said it was "conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion." *Id.* at 28. The Court also noted that the action had been "dismissed for failure to state a claim before an answer was filed," and express[ed] no opinion as to the appropriate remedy." *Id.*

After the Supreme Court announced its decision, Vermont promulgated a regulation to confirm its administrative practice. The regulation expressly provides that the credit is not available to a Vermont resident who has "previously registered that vehicle in the state where it was acquired or in any other state." App. 7a-8a.

Upon remand the State filed an answer, pled sovereign immunity (App. 12a-13a) and ultimately won dismissal of the case a second time. Pet. App. 3a-5a. The Vermont Supreme Court held that the State and an official sued in an official capacity could not be held liable for damages under 42 U.S.C. § 1983. *Id.* 5a-9a. It held that Vermont law established an administrative remedy for petitioner's tax claims, but did not establish a parallel remedy in its courts of plenary jurisdiction. *Id.* 11a-17a. It held that petitioners had failed to state a claim for declaratory relief in the superior court.

Factual Background/Preliminary Proceedings

Petitioner Williams (like Petitioner Levine) paid the Vermont motor vehicle and use tax to the State of Vermont, and not "to Respondent William Conway, the Vermont Commissioner of Motor Vehicles." *Compare* Petition at 4. As the Vermont Supreme Court observed, "Manifestly and explicitly, the State of Vermont is the defendant in these cases." Pet. App. 5a. And, although Mr. Williams may have "applied for" a Vermont regis-

tration in October, 1981, he did not pay the tax or register the vehicle until August, 1982. Petition at 4. This was eighteen months after he became a resident of Vermont, *id.*, and should have registered the vehicle in Vermont. *See* 23 V.S.A. §§ 4(30) and 301. (App. 5a and 6a).

State Court Action

Petitioner Williams commenced the action on November 24, 1982, not in 1981. *See*, for example, Pet. App. 31a. Petitioners' amended complaint, dated January 20, 1983, was "explicitly and solely founded on 42 U.S.C. § 1983." *Id.* at 5a. *See also* App. at 9a-11a (Amended Complaint). It was not an application for review of governmental action pursuant to Rule 75 of the Vermont Rules of Civil Procedure (*see* App. 9a-11a), and the availability of that remedy was not an issue in the case. *Compare* Petition at 5, n.2.

Petitioner Levine

One irony in the case is that petitioner Levine would have avoided paying the Vermont purchase and use tax had she registered her car in November, 1979, when she first moved to Vermont. *See Williams v. Vermont*, *supra*, 472 U.S. at 18 ("Prior to September 1, 1980, the statute also excepted 'pleasure cars, the owners of which were not residents of this State at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont.' "). Instead, Ms. Levine continued to drive on her New York registration and did not register in Vermont until December, 1982, three years after she moved. Petition at 5-6. The money she saved in annual registration fees ($32 per year) was about equal to the use tax she eventually paid.

Superior Court Decision (1983), Vermont Supreme Court Decision (1984), United States Supreme Court Decision (1985), and Vermont Supreme Court Entry Order (1985)

The petition accurately states the chronology of events. The several decisions speak for themselves.

Superior Court After Remand

The superior court permitted extensive discovery and the parties developed a substantial record before the court granted the State's motion to dismiss. [Under the Vermont rules of procedure, as under the federal rules, the defense of failure to state a claim may be raised at any time up to trial. *See* V.R.C.P. 12(h) (App. 2a-3a).] The enormity of the record is reflected in the court's Supplemental List of Documents, the list of one hundred plus documents filed in the trial court after remand from the United States Supreme Court. App. 14a-24a. The extent of the discovery is indicated by the title of one of these documents: item #131 (App. 22a) was "Plaintiffs' Motion to File *Fifth* Set of Interrogatories and Requests to Produce and Plaintiffs' *Fifth* Set of Interrogatories and Requests to Produce" (emphasis added).

The discovery materials show that two Vermont residents managed to obtain tax credits even though they had first registered their cars in other states. Petition at 8. However, the discovery materials also show that these instances were aberrations contrary to State policy. The State policy from 1980 to the present has been to deny the tax credit to registrants who first register their vehicles outside Vermont. *See* App. 25a-35a (deposition excerpts of Clinton Krauss 25a-28a, Thomas McCormick 29a-30a, Harold Cone 31a-32a, Dean Martin 33a, and Louis Theriault 34a-35a).

Vermont Supreme Court After Remand

The Vermont Supreme Court did not dismiss the § 1983 claims because it "assumed Respondent Conway was being sued only in his official capacity . . ." *Compare* Petition

at 10, n.6. The record reflects, App. 1a, and the Court noted that in fact Mr. Williams served process on "the State and Commissioner Conway, pursuant to V.R.C.P. 4(d)(2), by serving the Attorney General." Pet. App. 3a. (Ms. Levin intervened in the case by motion.) Rule 4(d)(2) establishes the means for suing state officials in their official capacity, and is not a means for serving process on an individual. App. 2a.

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because, contrary to petitioners' assertions:

1. The Vermont courts gave full effect to the mandate of this Court in *Williams v. Vermont.*

2. The Vermont Supreme Court correctly applied *Will v. Michigan* and Vermont law, and properly rejected petitioners' claims for damages and declaratory relief.

3. Vermont's administrative remedy for resolving tax disputes satisfies due process.

4. Petitioners' commerce clause claim was not decided by the Vermont Supreme Court and is not ripe for review by this Court.

I. THE VERMONT COURTS GAVE FULL EFFECT TO THE MANDATE OF THIS COURT IN *WILLIAMS v. VERMONT.*

Petitioners contend that the Vermont Supreme Court "has taken unusual liberties on remand." Petition at 18. They claim that it dismissed their case "based on respondents' bare assertion that the tax is not administered as written." *Id.* They claim that it "prevented petitioners from obtaining evidence about the truth or falsity of that representation . . ." *Id.*

The record tells a different story. In 1985 this Court noted that petitioners' complaint had been dismissed "be-

fore an answer was filed", and ordered "further proceedings not inconsistent with this opinion." 472 U.S. at 28. The expectation was that the State would file an answer and defend the action, and that is exactly what happened. On September 12, 1985, three days after the case was remanded to the superior court, the State filed an answer and raised affirmative defenses including the petitioners' tories and requests to produce. *See* App. 14a-24a (Sup-App. 12a-13a. The Vermont courts did not take any "liberties" in allowing the State to plead to the complaint or in ruling on those pleadings.

Petitioners' claim that the Vermont Supreme Court dismissed the action "based on respondents' bare assertion that the tax is not administered as written" is wrong on two counts. First, the Court did not base its opinion on such an assertion. *See* Pet. App. 1a-23a. Second, respondents have consistently interpreted the statute to mean that old and new residents should be treated alike, and have administered it accordingly. *See* Pet. App. 40a-41a (trial court analysis and construction of the statute) and App. 25a-30a (Krauss deposition, McCormick deposition).

Petitioners' assertion that the Vermont courts prevented them from obtaining evidence is also unfounded. Discovery was finally halted by the ruling on the State's Motion to Dismiss, but not until petitioners had taken seventeen depositions and served five sets of interrogatories and requests to produce. *See* App. 14a-24a (Supplemental List of Documents). This level of activity was all the more remarkable because for the most part it was conducted, and sanctioned by the court, after the State had filed its motion to dismiss on legal grounds.

II. THE VERMONT SUPREME COURT CORRECTLY APPLIED *WILL v. MICHIGAN* AND VERMONT LAW AND PROPERLY REJECTED PETITIONERS' CLAIMS FOR DAMAGES AND DECLARATORY RELIEF.

Peitioners sued in state court and named the State of Vermont and William Conway, the Vermont Commissioner of Motor Vehicles, as defendants. They based their action explicitly and solely on § 1983. (App. 9a-11a, and Pet. App. 7a). However, they served process on Commissioner Conway by service on the Attorney General's Office (App. 1a), and therefore sued him, in his official capacity only. Their monetary claims, claims for tax refunds, would have been paid from the State treasury.

The Vermont Supreme Court's decision that petitioners thus failed to state a money damages claim under § 1983 is supported by several decisions of this Court. "(W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . . even though individual officials are nominal defendants." *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Under *Will v. Michigan Department of State Police*, 109 S. Ct. 2304 (1989), § 1983 is not available for such relief. "*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." *Howlett v. Rose*, 110 S. Ct. 2430, 2437 (1990).

The Vermont Supreme Court's decision on petitioners' claim for declaratory relief was also in accord with prior law. The issue in this regard was whether the superior court had jurisdiction to award declaratory relief. The Vermont Supreme Court held that the superior court did not have such jurisdiction because the Vermont Legislature had designated another tribunal to hear petitioners' tax claims and because the declaratory issues were not "justiciable on their own account, detached from the

refund claims." Pet. App. 17a-21a. This reasoning conforms with the applicable Vermont statutes and case law and does not raise federal issues. *See* 12 V.S.A. §§ 4711-25 (Vermont Declaratory Judgments Act); 3 V.S.A. § 807 (Vermont Administrative Procedures Act provision for declaratory judgment actions); *Demag v. American Ins. Co.*, 146 Vt. 608, 610, 508 A.2d 697, 698 (1986) (superior court lacked jurisdiction because plaintiff did not pursue administrative remedy); *Lace v. University of Vermont*, 131 Vt. 170, 175, 303 A.2d 475, 478 (1973) (without justiciable controversy the declaratory judgment can provide no more than advisory opinion, which Vermont judiciary does not have power to render).

This case is not an occasion for resolving any disagreement among the states on whether state courts must entertain tax challenges under § 1983, as petitioners have suggested. The Vermont Supreme Court did not reject the possibility of a state court action to challenge a tax on constitutional grounds. It recognized that "Although § 1983 was clearly intended to provide a federal forum for those seeking vindication of federal rights, there is no bar to the statute's use in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980); *Beauregard v. City of St. Albans*, 141 Vt. 624, 626, 450 A.2d 1148, 1149 (1982)." (Pet. App. 7a-8a). At the same time it also recognized, properly, that the state and a state official sued in his official capacity are not persons subject to suit under § 1983.

III. VERMONT'S ADMINISTRATIVE REMEDY FOR RESOLVING TAX DISPUTES SATISFIES DUE PROCESS.

Petitioners' third claim is that "the administrative remedy endorsed by the Vermont Supreme Court fails to satisfy minimum Federal due process requirements." This claim is without merit.

Petitioners cite *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 110 L. Ed.2d 17 (1990). Prop-

erly cited, *McKesson* stands for the proposition that due process does not require that states provide an opportunity for a hearing prior to the exaction of taxes so long as they provide a post-deprivation procedure in which refunds or other suitable relief are available. *Id.* at 35-37. Vermont provides post-deprivation relief through the administrative process of 32 V.S.A. § 8914 and judicial review. See Pet. App. 11a-15a and App. 7a.

Title 23 V.S.A. §§ 105-107 (App. 5a-6a) gives the Commissioner of Motor Vehicles authority to conduct hearings, subpoena witnesses, and cause other acts normally associated with administrative litigation—including discovery. The Commissioner may also appoint hearing officers to conduct hearings; in fact, this is the Commissioner's customary method for administrative review of appeals from Department actions.

Furthermore, contrary to the Petitioners' assertion, once the administrative appeal process is completed under § 8914 and §§ 105-107, a litigant has the right under Vermont's Administrative Procedure Act (APA), 3 V.S.A. §§ 801 *et seq.*, to appeal a contested case to the Vermont Supreme Court, 3 V.S.A. § 815(a). See App. 4a. In the case of *In Re Kelscot, Ltd.*, 152 Vt. 579, 580-581, 568 A.2d 378, 379-80 (1989), the Vermont Supreme Court held that contested cases before Vermont administrative agencies, specifically the Department of Motor Vehicles, are subject to the appeal provisions of 3 V.S.A. § 815. And, in the event a full record has not developed in the original hearing, § 815(b) provides for augmentation of the record to include material evidence. See App. 4a.

In the instant case, Petitioner Williams made various attempts not to pay the tax required by 32 V.S.A. § 8903. In the end, both he and Petitioner Levine paid the use tax in § 8903(b). Petitioner Levine never petitioned for a refund under § 8914 or requested a hearing. Even if she had, and the request was denied, Petitioner's avail-

able, immediate and adequate administrative remedy was a hearing pursuant to 23 V.S.A. §§ 105-107 and appellate review pursuant to 3 V.S.A. § 815. Petitioner Williams did petition for a refund under § 8914. When the Commissioner upheld the Department's imposition of the tax, thus denying the credit, Petitioner Williams had the right to appeal pursuant to the APA, 3 V.S.A. § 815. He failed to pursue that right.

The ready availability of an adequate administrative review process and the right to appellate court review, including the ability to establish a record at the administrative tribunal level and to supplement that record at the appellate level, belie Petitioners' assertion that Vermont's administrative remedy denies them basic procedural due process.

IV. PETITIONERS' COMMERCE CLAUSE CLAIM WAS NOT DECIDED BY THE VERMONT SUPREME COURT AND IS NOT RIPE FOR REVIEW BY THIS COURT.

The Vermont Supreme Court did not decide and did not have to decide petitioners' commerce clause argument. The narrower question before it was whether Vermont's administrative procedure for resolving tax complaints gave the motor vehicle commissioner the authority to rule on this argument. *See* Pet. App. 12a-14a. The Court held that the commissioner had this authority under Vermont law and that the petitioners had an available remedy in the administrative forum. *Id.*

Petitioners' commerce argument is that a compensatory use tax credit is constitutionally required for sales taxes paid to other states. They rely primarily on two cases: *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988) and *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232 (1987). Neither case mandates the result petitioners are seeking.

D.H. Holmes sustained a Louisiana use tax on catalogs published out-of-state and mailed to Louisiana residents. The Court decided that "in the present case, it really makes little difference for commerce clause purposes whether appellant's catalogs 'came to rest' . . . in Louisiana . . . or whether they were still considered in the stream of commerce." *Id.* at 31. It made little difference because "interstate commerce may be required to pay its fair share of state taxes", *id.*, and because Louisiana met the apportionment requirement established by *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

The *Holmes* decision does not implicate the Vermont motor vehicle purchase and use tax because the Vermont tax is not a tax on commerce. The tax is imposed whether the vehicle is purchased in Vermont or elsewhere, and the amount of the tax is the same wherever the vehicle is purchased. Petitioners' vehicles were not in transit when they were taxed, and their owners had settled in Vermont long before they paid the tax. The *Holmes* case did not modify any of the precedents which hold that a state may impose a non-discriminatory tax in these circumstances. *See, e.g., Brown v. Houston*, 114 U.S. 622, 633 (1885); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582-83 (1937); *General Trading Company v. State Tax Commission*, 322 U.S. 335, 338 (1944).

Nor is the Vermont tax suspect as a result of the *Tyler Pipe* decision. That case concerned a manufacturing tax that the State of Washington imposed only on products sold to out-of-state customers. The Court held that that tax, which was obviously discriminatory, could not be justified as a legitimate "compensating tax." 483 U.S. at 242. Again, the Vermont tax is not discriminatory; it applies to all Vermont residents and applies without regard to where they purchase their vehicles.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

RONALD W. WEST, Sheriff

RETURN OF SERVICE

STATE OF VERMONT
WASHINGTON COUNTY, ss.

On the 24th day of Nov., 1982, I made service of the Summons & Complaint upon the defendant William H. Conway, Jr., Vermont Commissioner of Motor Vehicles' by delivering a copy of the above to the Vermont State Attorney General at his office in Montpelier, Vermont.

Service ..... $———

Travel .....———Miles ..... $———

Fees ..... $———

postage .... ———

Total ..... $———

/s/ Ronald West
RONALD W. WEST
Sheriff

Vermont Rules of Civil Procedure

* * * *

RULE 4. PROCESS

* * * *

(d) Summons: Personal Service Within the State. The summons and complaint shall be served together. Personal service within the state shall be made as follows:

(1) Upon an individual by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The court, on motion, upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode, or to be made by publication pursuant to subdivision (g) of this rule, if the court deems publication to be more effective.

* * * *

(2) Upon the State of Vermont or any agency or officer thereof, by delivering a copy of the summons and of the complaint to the Attorney General or the Deputy Attorney General.

* * * *

RULE 12. DEFENSES AND OBJECTS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

* * * *

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency

of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

VERMONT STATUTES
ANNOTATED

* * * *

TITLE THREE

Executive

* * * *

Chapter 25. Administrative Procedure

* * * *

§ 815. Judicial review of contested cases

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the supreme court, unless some other court is expressly provided by law. However, a preliminary, procedural, or intermediate agency action or ruling is immediately appealable under those rules if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(b) If, before the date set for court hearing, application is made to the court for leave to present additional evidence, and it is shown to the saitsfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decisions by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.—

* * * *

TITLE TWENTY-THREE

MOTOR VEHICLES

Chapter 1. General Provisions

* * * *

§ 4. Definitions

* * * *

(30) Resident shall include all legal residents of this state and in addition thereto, any person except a person who is domiciled in another state and who returns to the state on a regular basis of no less than weekly who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto, any foreign partnership, firm, association or corporation having a place of business in this state shall be deemed to be a resident as to all vehicles owned or leased and which are garaged or maintained in this state;

* * * *

Chapter 3. Motor Vehicle Department

* * * *

§ 105. Hearing before commissioner

In the administration of the laws relating to motor vehicles and to the operators and the operation thereof, the commissioner may conduct hearings, subpoena witnesses, administer oaths and take testimony. He may also cause depositions to be taken and order the production of books, papers and records relating to the matter under investigation. The fees for travel and attendance of witnesses and fees for officers shall be the same as for witnesses and officers before a district court and shall be paid by the state upon presentation of proper bills of cost to the commissioner of finance and management. The fees of witnesses summoned or used by such peti-

tioner shall be paid by him. The commissioner may appoint a hearing officer to conduct hearings.

§ 106. Procedure upon hearings

The commissioner shall determine the rules and procedure under which such hearings shall be held. On request of the commissioner, the state's attorney of the county where such hearing is to be held shall attend and represent the state.

§ 107. Notice of hearings

Notice of a hearing held by the commissioner or the hearing officer under the provisions of sections 105 and 106 of this title, shall state the place, day and hour thereof, and warn the petitioner that he may then appear through himself or counsel. Service of such notice shall be sufficient if sent by registered mail to the address given by the petitioner at least five days before the day set for the hearing, provided a return receipt has been received.

* * * *

Chapter 7. Registration

SUBCHAPTER 1. GENERAL REGISTRATION

ARTICLE 1. GENERAL PROVISIONS

§ 301. Persons required to register

Residents as defined in section 4 of the title, except as provided in section 301a and chapter 35 of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

* * * *

TITLE THIRTY-TWO

TAXATION AND FINANCE

* * * *

Chapter 219. Motor Vehicle Purchase and Use Tax

* * * *

§ 8903. Tax imposed

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $500.00 for each motor vehicle, whichever is smaller.

(b) There is hereby imposed upon the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $500.00 for each motor vericle, whichever is smaller, by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.

(c) The Vermont registration or transfer of Vermont registration of a motor vehicle shall be conclusive evidence that the purchase and use tax applies except as provided in section 8911 of this title.—

* * * *

§ 8914. Refund

Any overpayment of such tax as determined by the commissioner shall be refunded.

MOTOR VEHICLE PURCHASE AND USE TAX

The purpose of this rule is to interpret, and to assist in the implementation of 32 V.S.A. § 8911(9), and to be

declarative of the practice used by the Department of Motor Vehicles with respect to its administration.

The credit provided in and by 32 V.S.A. § 8911(9) shall be available to the following persons in the circumstances set forth below:

1. A resident of Vermont, as defined in 32 V.S.A. § 8902(2), shall be entitled to receive a pro rata credit for a sales or use tax paid to another state upon the submission to the Department of an application for Vermont registration, and the payment of the registration fees if:

   a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

   b. The tax paid to that state is nonrefundable, and

   c. The vehicle acquired is a pleasure car, and

   d. The person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

2. For the purpose of this rule, the applicant shall have the burden of proving to the Department's satisfaction that

   a. The state in which the vehicle was acquired would grant the same pro rata credit for Vermont tax paid under similar circumstances, and

   b. The tax paid is nonrefundable, and

   c. That the person applying for a Vermont registration has not previously registered that vehicle in the state where it was acquired or in any other state.

3. For the purpose of this rule, a vehicle shall not be considered to have been registered if the applicant has been issued an intransit permit.

Effective: 7/5/86

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and
SUSAN LEVINE,

Plaintiffs,

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,

Defendants.

AMENDED COMPLAINT

Norman Williams, pro se, and Susan Levine, by her attorneys, Gravel, Shea & Wright, Ltd., complain of the Defendants and allege as follows:

PRELIMINARY STATEMENT

1. This action is brought by the Plaintiffs to prevent deprivation under the color of Vermont law of certain rights, privileges and immunities secured to the Plaintiffs by the Constitutions of the United States and the State of Vermont. The action seeks a judgment ordering that the "purchase and use tax" paid by Plaintiffs under Sections 8903 and 8911 of Title 32, Vermont Statutes Annotated, be refunded and declaring that such sections are unconstitutional, both in general and as applied to Plaintiffs on the particular facts of this case.

2. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988. The relief sought is mandated by

Austin v. New Hampshire, 420 U.S. 656 (1975), and *Baldwin v. Fish & Game Commission*, 436 U.S. 371 (1978).

PARTIES

3. Plaintiff Norman Williams is a Vermont resident who moved to Vermont from Illinois on February 1, 1981. Plaintiff Williams has worked in Vermont since February 1, 1981, and thus qualifies as a resident for purposes of 32 V.S.A. § 8902(2) and 23 V.S.A. § 4(30).

4. Plaintiff Susan Levine is a Vermont resident who moved to Vermont from New York in November, 1979. Plaintiff has worked in Vermont since November, 1979, and thus qualifies as a resident for purposes of 32 V.S.A. § 8902(2) and 23 V.S.A. § 4(30).

5. Defendant William H. Conway, Jr., is Commissioner of the Department of Motor Vehicles for the State of Vermont. Defendant Conway is authorized under 32 V.S.A. § 8901 to administer the Motor Vehicle Purchase and Use Tax imposed by 32 V.S.A. § 8903 and under 32 V.S.A. § 8909 to suspend the right to operate a motor vehicle in the event such tax is not paid.

FACTUAL ALLEGATIONS

* * * *

RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered:

1. Declaring that 32 V.S.A. §§ 8903(b), 8909, and 8911 are unconstitutional and void insofar as they impose a registration fee and license suspension penalty on Plaintiffs by reason of their non-resident status which would not be imposed on Vermont residents in the same circumstances;

2. Ordering the Defendant Department of Motor Vehicles to refund the purchase and use tax of $172 paid by

Plaintiff Williams and the $110 paid by Plaintiff Levine in this case; and

3. Granting Plaintiffs such other relief as the court may deem just, proper, and equitable, including costs and reasonable attorneys' fees as authorized by 42 U.S.C. § 1988.

Dated: Burlington, Vermont
January 20, 1983

The Plaintiffs

/s/ Norman Williams
NORMAN WILLIAMS, ESQ.
Pro Se and Attorney for
Susan Levine
Gravel, Shea & Wright, Ltd.
P.O. Box 1049
Burlington, VT 05402
(802) 658-0220

STATE OF VERMONT

WASHINGTON COUNTY, ss.

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and SUSAN LEVINE,
Plaintiffs

v.

STATE OF VERMONT and WILLIAM H. CONWAY, JR.,
VERMONT COMMISSIONER OF MOTOR VEHICLES,
Defendants

ANSWER

NOW COME the State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles, by and through their attorney, Assistant Attorney General Andrew M. Eschen, and answer the Amended Complaint as follows:

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim upon which relief can be granted.
2. statute of limitations
3. laches
4. waiver
5. estoppel
6. unclean hands
7. mootness
8. sovereign immunity
9. The Vermont motor vehicles purchase and use tax, 32 V.S.A. § 8902 *et seq.* is not unconstitutional on its face.

In the alternative, if it is unconstitutional on its face, the tax is, and has been, administered in a nondiscriminatory fashion and is, in actuality of operation, constitutional.

WHEREFORE, defendants demand that this action be dismissed, and that they be awarded their costs and reasonable attorney's fees.

DATED AT Montpelier, Vermont, this 12th day of September, 1985.

STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General

By: /s/ Andrew M. Eschen
ANDREW M. ESCHEN
Assistant Attorney General

STATE OF VERMONT

WASHINGTON COUNTY, ss

WASHINGTON SUPERIOR COURT

Docket No. S-436-82 Wnc

NORMAN WILLIAMS and
SUSAN LAVINE (sic)

vs.

STATE OF VERMONT and
WILLIAM H. CONWAY, JR.

SUPPLEMENTAL LIST OF DOCUMENTS

See Attached Lists of Documents 1 through 15 and 16 through 29

30. Certified copy of Opinion from the Supreme Court of the United States.

31. Copy of letter from Atty. Eschen to Attorney Williams re U.S. Supreme Court's Order to pay $945.80 for costs in this action.

32. Copy of Entry Order from the VT Supreme Court: "Counsel shall show cause by August 2, 1985, why this matter should not be remanded to the trial court for further proceedings in consonance with the decision of the Supreme Court of the United States."

33. Memorandum of Law in Response to Show Cause Order.

34. Memorandum in Reply to Appellees' Memorandum Dated July 29, 1985.

35. Copy of Entry Order from the VT Supreme Court: "Upon consideration of the memorandum of counsel, together with the opinion of the United States Supreme Court, it it hereby ordered that this matter is remanded to the Washington Superior Court for further proceedings not inconsistent with the opinion of the United States Supreme Court."

36. Answer.

37. Defendant's First Set of Interrogatories.

38. Plaintiffs' Answers to Interrogatories.

39. Plaintiffs' Answers to Interrogatories.

40. Certified copies of Entry Orders (2) from the VT Supreme Court (See # 32 and # 35).

41. Plaintiffs' Request for Production of Documents and Interrogatories [First Set].

42. Discovery Certificate re Answers to Plaintiffs' First Set of Requests for Production and Interrogatories.

43. Order.

44. Order--designating cause as a complex action and appointing The Honorable James L. Morse trial judge for the proceedings.

45. Defendants' Requests to Admit.

46. Defendants' Second Set of Interrogatories to Plaintiff Levine.

47. Certificate of Service re Responses to Defendants' Second Set of Interrogatories to Levine and to Defendants' Requests to Admit.

48. Copy of letter from Attorney Eschen to Reporter DeSerres re Deposition of Commissioner Conway.

49. Motion to Dismiss and in the Alternative, Motion for Summary Judgment and Memorandum of Law in Support of Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted,

and in the Alternative, Motion for Summary Judgment.

50. Answer to Requests to Admit.

51. Answers to Plaintiffs' Second Set of Interrogatories and Requests to Produce.

52. Copy of Supplemental Memorandum of Law in Support of Motion to Dismiss (original is located in S-56-86 Wnc, Quinn, et al v. State of VT, et al).

53. Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

54. Copies of three (3) Vermont cases submitted by Attorney Williams as additional support for Plaintiffs' Memorandum in Opposition to Summary Judgment (by letter dated 3/26/86).

55. Letter filed by Attorney Eschen in response to Attorney Williams' letter dated 3/26/86).

56. Motion to Quash, Memorandum of Law and Affidavit of William H. Conway, Jr.

57. Notice of Deposition Duces Tecum to Thomas McCormick.

58. Notice of Deposition Duces Tecum to George Paquette.

59. Notice of Deposition Duces Tecum to Mary Smith.

60. Notice of Deposition Duces Tecum to Mary LeBlanc.

61. Notice of Deposition Duces Tecum to Mary Ashcroft.

62. Notice of Deposition Duces Tecum to Gordon Currier.

63. Notice of Deposition Duces Tecum to Dean Martin.

64. Notice of Deposition Duces Tecum to Barbara Rugeau.

65. Notice of Deposition Duces Tecum to Wayne Sullivan.

66. Motion for Protective Order, Objection to Notice of Deposition Duces Tecum, and Motion to Quash Subpoenas, with Memorandum of Law.

67. Request for Supplementation.

68. Supplementation to Defendants' Response to Plaintiffs' First Set of Requests for Production and Interrogatories.

69. Notice of Appearance of Manchester & O'Neill, P.C. for Plaintiffs.

70. Order re Defendants' Motion for Protective Order, Objection to Deposition Duces Tecum, and Motion to Quash Subpoenas.

71. Plaintiffs' Motion to Compel Defendant William H. Conway, Jr. to File Sworn Answers to Plaintiffs' First and Second Set of Requests for Production and Interrogatories.

72. Plaintiffs' Motion to Compel Complete Answers of Plaintiffs' First Set of Requests for Production and Interrogatories.

73. Plaintiffs' Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Set of Requests for Production and Interrogatories & Memorandum of Points and Authorities.

74. Plaintiffs' Third Interrogatories and Requests to Produce.

75. Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Set of Requests for Production and Interrogatories & Memorandum of Points and Authorities.

76. Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Complete Answers to Plaintiffs'

First Set of Requests for Production & Interrogatories.

77. Defendants' Motion to Compel Plaintiff Norman Williams to File Sworn Answers to Defendants' First Set of Interrogatories.

78. Plaintiffs' Answers to Interrogatories.

79. Plaintiffs' Supplemental Memorandum in Support of Their Motion to Compel Complete Answers to Plaintiffs' First Set of Requests for Production and Interrogatories.

80. Plaintiffs' Supplemental Memorandum in Support of Their Motion to Compel Defendant State of Vermont to Answer Plaintiffs' First Interrogatories and Request to Produce.

81. Plaintiffs' Notice of Deposition Pursuant to Rule 30(b)(5), (6) of the Vermont Rules of Civil Procedure.

82. Plaintiffs' Notice of Deposition Duces Tecum.

83. Defendants' Third Set of Interrogatories and Request to Produce.

84. Defendants' Request to Admit (Second Set).

85. Defendants' Request to Admit (Second Set).

86. Order re discovery motions.

87. Plaintiffs' Discovery Certificate re Plaintiff Norman Williams' Response to Defendants' Request to Admit (Second Set) and Plaintiff Susan Levine's Response to Defendants' Request to Admit (Second Set).

88. Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment.

89. Plaintiffs' Motion to Further Extend Discovery and Memorandum of Points and Authorities.

90. Plaintiffs' Notice of Deposition Duces Tecum of Susan Crampton.

91. Plaintiffs' Notice of Deposition Duces Tecum of William Conway.

92. Plaintiffs' Second Notice of Depositions Duces Tecum.

93. Plaintiffs' Motion to Compel Defendants to Answer Plaintiffs' Third Interrogatories and Requests to Produce.

94. Consolidated Motion for Protective Order and Sanctions and Consolidated Memorandum of Law in Support of Motion for Protective Order, in Opposition to Plaintiffs' Motion to Further Extend Discovery, and in Support of Sanctions.

95. Plaintiffs' Answers to Defendants' Third Set of Interogatories and Requests to Produce.

96. Defendants' Motion to Compel Plaintiffs to Answer Third Set of Interrogatories, and Requests to Produce, with Memorandum of Law.

97. Plaintiffs' Amended Notice of Deposition Duces Tecum of Laura Parker.

98. Plaintiffs' Fourth Set of Interrogatories.

99. Motion to File Interrogatories and to Shorten Time for Response.

100. Plaintiffs' Notice of Deposition of Defendant William H. Conway, Jr.

101. Memorandum of Law in Support of Motion for Protective Order and/or Motion to Quash.

102. Plaintiffs' Notice of Deposition of Susan Crampton.

103. Motion to Compel Deposition Testimony and Plaintiffs' Memorandum of Law in Support of Motion to Compel Deposition Testimony.

104. Motion for Protective Order and/or Motion to Quash (Memo is # 101).

105. Motion to Compel and Memorandum of Law in Support of Motion to Compel.

106. Motion for Protective Order and/or Motion to Quash, with Memorandum of Law.

107. Motion to Shorten Time for Notice of Deposition or to Extend Discovery Schedule and Notice of Deposition Duces Tecum to Clyde Cassidy.

108. Memorandum in Opposition to Plaintiffs' Motion to File Interrogatories and to Shorten Time for Response.

109. Plaintiffs' Memorandum of Law in Opposition to Motions to Quash Depositions of William Conway and Susan Crampton.

110. Plaintiffs' Motion to Recuse the Honorable James L. Morse and Memorandum of Points and Authorities.

111. Motion for Protective Order and/or Motion to Quash, with Memorandum of Law.

112. Reply to Plaintiffs' Motion to Compel Deposition Testimony.

113. Plaintiffs' Motion to Enlarge the Period of Time for the Completion of Discovery and Memorandum of Points and Authorities.

114. Motion to Compel Production of Documents.

115. Response to Defendants' Motion to Compel Dated December 3, 1986.

116. Memorandum of Law in Support of Motion to Compel Production of Governmental Memorandum Dated September 4, 1985, September 12, 1985 and November 27, 1985.

117. Defendants' Memorandum in Opposition to Plaintiffs' Motion to recuse the Honorable James L. Morse, and in Reply to Plaintiffs' Memorandum of Law in Opposition to Motions to Quash Depositions of William Conway and Susan Crampton.

118. Plaintiffs' Memorandum of Law in Response to Defendants' Opposition to Fourth Set of Interrogatories.

119. Plaintiffs' Memorandum of Law in Opposition to Motion to Quash Deposition of Clyde Cassidy.

120. Plaintiffs' Response to Defendants' Rely to Motion to Compel Deposition Testimony.

121. Reply to Plaintiffs' Motion to Compel Production of Documents and Affidavit of John Dooley.

122. Order of Recusal.

123. Motion for Expedited Ruling on Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted Due to Defendants' Sovereign Immunity and to Preclude Further Discovery and Memorandum of Law in Support of Motion for Expedited Ruling on Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted Due to Defendants' Sovereign Immunity, and to Preclude Further Discovery.

124. Letter from Attorney Williams to Attorney Eschen dated 12/22/86, letter from Attorney Eschen to Attorney Williams dated 1/22/87, and Affidavit of Roy Williams filed in connection with Plaintiffs' Motion to File [Fourth Set of] Interrogatories and to Shorten Time for Response, and the Defendants' Memorandum in Opposition thereto.

125. Memorandum of Law in Opposition to Defendants' Motion to Dismiss Dated January 12, 1987.

126. Letter from Administrative Judge for Trial Courts to counsel of record advising he will consider a request to have the matters designated a complex action when the presiding judge in either Washington Superior Court or Chittenden Superior Court makes such a request under V.R.C.P. 16.1.

127. Letter from Reporter Leclerc to Attorney O'Neill re Deposition of Harold R. Cone (copy).

128. Letter from Reporter Leclerc to Attorney O'Neill re Depositions of Louis Theriault and Lois Hebert (copy).

129. Designation of actions as complex under V.R.C.P. § 16.1 and assignment of Judge Alden T. Bryan until further order of the Administrative Judge.

130. Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss Dated January 12, 1987.

131. Plaintiffs' Motion to File Fifth Set of Interrogatories and Requests to Produce.

132. Reply to Plaintiffs' Motion to File Fifth Set of Interrogatories and Requests to Produce.

133. Plaintiffs' Reply Memorandum in Opposition to Motion to Dismiss.

134. Defendants' Response to Plaintiffs' Reply Memorandum in Opposition to Motion to Dismiss (February 27, 1987).

135. Plaintiffs' Supplemental Memorandum of Law in Opposition to Motion to Dismiss.

136. Copy of Defendants' Supplemental Memorandum of Law (original is in Docket No. S-56-86 Wnc, Quinn v. State of VT).

137. Plaintiffs' Reply to Defendants' Supplemental Memorandum of Law.

138. Copy of Defendants' Response to Plaintiffs' Reply Memorandum (Dated April 6, 1987).

139. Copy of recent Second Circuit Opinion by Judge Oakes in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir-1986) (New York), letter from Attorney O'Neill dated 4/15/87).

140. Letter from Attorney Eschen in response to Attorney O'Neill's letter dated 4/15/87.

141. Defendants' Response to Plaintiffs' Reply Memorandum (Dated April 6, 1987).

142. Memorandum of Decision.

143. Motion for Clarification and/or Reconsideration of May 6, 1987 Order Denying Motion to Dismiss, and in the Alternative, Motion for Interlocutory Appeal, with Memorandum of Law, and Memorandum of Law in Support of Motion for Interlocutory Appeal.

144. Plaintiffs' Memorandum of Law in Opposition to Interlocutory Appeal.

145. Reply to Plaintiffs' Memorandum of Law in Opposition to Interlocutory Appeal.

146. Response to Plaintiffs' Reply Memorandum in Opposition to Motion for Reconsideration or Interlocutory Appeal.

147. Plaintiffs' Reply Memorandum in Opposition to Motion for Reconsideration or Interlocutory Appeal.

148. Plaintiffs' Reply Memorandum in Opposition to Motion to Appeal.

149. Letter from Attorney O'Neill to Judge Bryan re status of case, dated 11/9/87.

150. Letter from Attorney Eschen to Judge Bryan in response to Attorney O'Neill's letter dated 11/9/87.

151. Defendants' Response to Plaintiffs' Reply Memorandum in Opposition to Motion to Appeal.

152. Copy of recent decision by the VT Supreme Court on interlocutory appeals in the case of State *v. McCann*; copy of decision and article appearing at 80 A.L.R. 2d 1035 and 80 A.L.R. 2d 1040, concerning refunds of state taxes paid under protect or under compulsion; and copy of recent decision by Magistrate Niedermeier on the scope of attorney-client privilege and executive privilege in *Melson v. Bristow*, submitted by Attorney Williams.

153. Reply to Norman Williams' Letter of January 5, 1988.

154. Plaintiffs' Motion for Preservation and Immediate Discovery of Defendants' Motor Vehicle Computer Records.

155. Reply to Plaintiffs' Motion for Preservation and Immediate Discovery of Defendants' Motor Vehicle Computer Records.

156. Opinion and Order.

157. NOTICE OF APPEAL dated May 16, 1988 and filed May 17, 1988.

158. Index of Cases and copies of miscellaneous cases.

DATED at Montpelier, County of Washington and State of Vermont this 10th day of June, 1988.

/s/ Barbara B. Perojo
BARBARA B. PEROJO
Deputy Clerk

DEPOSITION OF CLINTON KRAUSS

* * * *

July 9, 1986

* * * *

Could you start off for us, please, by telling us what the position is you presently hold with the Department of Motor Vehicles?

A Presently I'm a Supervisor of the Information Section.

Q And as the Supervisor of the Information Section, what do you do?

A Our section is responsible for asking—answering telephone queries regarding a broad range of registration and licensing subjects, for handling a half dozen different types of paperwork.

* * * *

Q You say along the lines of this right along. You're talking about 23 VSA 301; is that correct?

A Where Vermont residents are required to register in the State of Vermont. And I had been administering it along those lines regularly. This particular gentleman disagreed with me vociferously—that's the politest way of putting it—and was so rude and insistent that I went to the Commissioner—I was so certain of my interpretation of it that I went to the Commissioner and asked him to deal with this gentleman. In the course of so doing, he pointed this out and strengthenend, if you will, my understanding of how I was supposed to be administering to Vermont residents who had or a person who was claiming to be a Vermont resident who had registered the vehicle elsewhere. According to the Commissioner and this section here and my prior understanding, he didn't possess that privilege.

Q Do I correctly understand that the reason he did not possess the privilege of claiming the exemption was because that Vermont resident had actually registered the car out of state?

A Registered and presumably used, yes.

Q Was the key criteria the registration of the car outside Vermont?

A It was certainly key. It was important.

* * * *

Q The particular one I think you're looking for is dated. It's dated May of 1985.

A May of '85. Yes. This is the—this placement [regulation] reflects almost precisely what was explained to me by the Commissioner in the course of handling the gentleman from Case two.

Q . . . Do I understand that up until the time that particular written policy, which you've now referring to, was implemented, that the inspectors were occasionally making what you perceived to be those mistakes in applying the—in giving exemptions to people they shouldn't?

A Yes, occasionally.

Q How often would you say over the period of time, say, since you've been in your position, has that occurred?

A Let's see. Six, seven that I know of.

* * * *

Q . . . . And I believe you were asked a question by Mr. O'Neill with respect to whether those individuals, in your opinion, were—should have been denied the credit.

A He said because they were really out of staters at the time, if I recall.

Q What was your understanding of that question?

A Of that exchange?

Q Yes.

A That these two were really not Vermont residents anyway, and that was the reason why, and the reason why really is because they registered there and used it there rather than the fact that they were or were not residents. The main one was they registered their vehicle there, and a Vermont resident doesn't have that privilege, so it just didn't apply to people who were out of staters; it applied also to any Vermonter, legitimate Vermonter who might have done the same thing. If this man had been my next door neighbor, I would have taxed him. He doesn't possess the privilege of driving to New Jersey

and buying license plates. I would have had to tax him. So whether he was [former Governor] Deane Davis or not, I would have taxed anyone in these circumstances, resident or non-resident.

MR. O'NEILL: Excuse me. Just for the record, if I may, when you say these circumstances, you're pointing to the two instances on the memo which is Exhibit 18; is that right?

DEPONENT: Yeah. And by circumstance I mean person who had registered a vehicle out of state for a—a person, resident or non-resident, who had registered a vehicle out of state for a significant period of time and used it there and then brought it back. So whether that person was a resident or a non-resident, I taxed them. The circumstances were the same.

* * * *

Q For example, George Aiken [former U.S. Senator], and that individual were to purchase a car in another state and first register that vehicle in that other state and were then to return to Vermont, would would be your practice?

A Taxed him. He did not possess that privilege.

* * * *

EXAMINATION BY MR. O'NEILL:

Q You testified . . . that after September 1, 1980 when the non-resident exemption has been repealed but before the conversation you had with Commissioner Conway, you were denying the credit to people who had registered their car outside of the State of Vermont who claimed to be Vermont residents and then sought to register it in Vermont; is that right?

A Yes.

* * * *

Q In the instances where you had some disagreement with the conclusions that had been reached by the inspectors, roughly a half dozen occasions, did you speak

with the inspectors about your disagreement with them, or did you try to get the policy clarified in some way so that there would be uniform policy?

A Both ways. Both ways.

Q What did you do?

A Well, some of these memos are, as I said, attempts to get clarification up from my position on this leg up and then hopefully down, and I have some reason to believe, perhaps, you know, that the substance of that policy may have been in part due to my efforts. I don't know.

Q You say the May of 1985 policy?

A Yes. That certainly reflects my understanding of how it was to be done right along, and I was pleased to see it.

* * * *

Q In other words, residency had nothing to do with that question? It was purely a question of where the vehicle was being registered?

A Yes.

I have carefully read the foregoing deposition and the answers made by me are true.

/s/ Clinton Krauss
CLINTON KRAUSS

STATE OF VERMONT
COUNTY OF WASHINGTON

At Montpelier in said County this 31st day of July, 1986, personally appeared the above-named Clinton Krauss and made oath that the foregoing answers, subscribed by him, are true.

Before me,

/s/ [Illegible]
Notary Public

My commission expires 2/10/87.

DEPOSITION OF THOMAS McCORMICK

* * * *

November 25, 1988

* * * *

Q And Mr. McCormick, could you tell us please how you are employed?

A I am director of law administration for the Department of Motor Vehicles.

Q How long have you held that position?

A Since about the third week in September of 1981.

* * * *

Q Let me rephrase the question to you. Isn't it a perfectly reasonable interpretation of that statute that the statute is intended to permit—irrespective of whether they register the car permanently outside Vermont or not— a person to go ahead and purchase—a Vermont resident to purchase an automobile outside of Vermont and not have to come back to Vermont and pay the tax again?

MR. ESCHEN: Objection.

A No, I don't think so.

* * * *

CERTIFICATE

I, Ann M. Whiting, Court Reporter and Notary Public, do hereby certify that the foregoing pages, numbered 4 through 78, inclusive, are a true and accurate transcription of my stenographic notes of the deposition of THOMAS McCORMICK, taken before me on Tuesday, November 25, 1986, at 10:52 a.m., for use in the matter of NORMAN WILLIAMS and SUSAN LEVINE VS STATE OF VERMONT AND WILLIAM H. CONWAY, JR., COMMISSIONER OF MOTOR VEHICLES. VALERIE M. QUINN, ET AL VS STATE OF VERMONT, ET AL.

/s/ _____

ANN M. WHITING

DEPOSITION OF HAROLD R. CONE

* * * *

November 20, 1986

* * * *

A . . . '75 approximately I moved into Montpelier as what was called a supervising inspector. . . . two, three years later it was changed to chief inspector, the title, not the job but the title. And I was chief inspector until the 1st of September, 1984 when I retired.

* * * *

Q Mr. Cone, to your personal knowledge how many times was a tax credit given to someone who had first registered their car out of state, again, in the example of a Vermonter who had first registered their car out of state?

A By me?

Q Yes.

A I can't even tell you for sure that I gave it in more than one instance. You know, I can't remember back that far.

Q And with respect to the people who were beneath you who were in your division, do you know how many times they granted a credit to a Vermonter who had first registered outside the state?

A No, I have no way of knowing.

* * * *

CERTIFICATE

I, Angela M. LeClerc, Court Reporter and Notary Public, hereby certify that the foregoing pages 4-43 inclusive comprise a full, true and correct transcript taken from my stenographic notes in the deposition taken of HAROLD R. CONE, taken before me as Notary Public on Thursday, November 20, 1986, at the Tavern Motor Inn, Montpelier, Vermont, and transcribed by me for use in the case of *Norman Williams and Susan Levine vs. State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles*, Docket No. 436-82 WnC, now pending before the Washington Superior Court.

/s/ Angela M. Leclerc
ANGELA M. LECLERC

My commission expires February 10, 1987.

DEPOSITION OF DEAN MARTIN

* * * *

July 30, 1986

* * * *

Q. Mr. Martin, how are you employed, sir?
A. With the Vermont Department of Motor Vehicles.

* * * *

Q. Do you feel qualified to give an answer on behalf of the entire Department of Motor Vehicles with respect to how the tax credit was administered before or after June of '85?
MR. O'NEILL: Objection.
A. No.

* * * *

I have carefully read the foregoing deposition and the answers made by me are true.

/s/ Dean Martin
DEAN MARTIN

STATE OF VERMONT
COUNTY OF WASHINGTON

At Montpelier in said county this 25th day of August, 1986, personally appeared the above-named DEAN MARTIN, and made oath that the foregoing answers, subscribed by him are true.

Before me,

/s/ Bonnie L. Rutledge
Notary Public

DEPOSITION OF LOUIS THERIAULT

* * * *

November 20, 1986

* * * *

Q And, Mr. Theriault, how are you employed, sir?

A I'm an inspector for the Vermont Department of Motor Vehicles.

* * * *

Q Let me see if I understand what's going on here. In all cases would that person receive the tax credit? Let me rephrase the question. In 1981 or 1982 would a person who holds himself out as a Vermont resident automatically be entitled to a tax credit from you?

MR. O'NEILL: Objection.

A No one—I've never exempted anyone automatically from paying a tax based solely on the claim that he was a Vermont resident.

Q What would you look to in determining whether an individual would be entitled to the tax credit?

A First of all, the type of vehicle concerned, whether or not we had reciprocity with whatever particular state we're talking about. I would try and determine that he in fact was a Vermont resident through the question of unemployment and so on, and if he had proof that he paid the tax, I would say he would be tax exempt.

Q And if the person had permanently registered the vehicle in another state before he came back to Vermont, was that a consideration that you would look into?

A It's a consideration.

* * * *

CERTIFICATE

I, Angela M. Leclerc, Court Reporter and Notary Public, hereby certify that the foregoing pages 4-21 inclusive comprise a full, true and correct transcript taken from my stenographic notes in the deposition taken of LOUIS THERIAULT, taken before me as Notary Public on Thursday, November 20, 1986, at the Tavern Motor Inn, Montpelier, Vermont, and transcribed by me for use in the case of *Norman Williams and Susan Levine vs. State of Vermont and William H. Conway, Jr., Commissioner of Motor Vehicles*, Docket No. 436-82 WnC, now pending before the Washington Superior Court.

/s/ Angela M. Leclerc
ANGELA M. LECLERC

My commission expires February 10, 1987.